

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BONITA UNIFIED SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014040290

DECISION

Bonita Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on April 4, 2014, naming Student.

Kara K. Hatfield, Administrative Law Judge, heard this matter in San Dimas, California, on May 29, 2014.

Attorney Carlos Gonzalez represented District. Carl Coles, District's Senior Director of Special Education, attended the hearing.

Despite proper notice to Student's mother (Mother), neither Mother nor any other representative of Student attended the hearing.

At the close of the hearing, the matter was continued at District's request until June 9, 2014, so District could file and serve a written closing argument. Closing argument was filed, the record was closed, and the matter was submitted on June 9, 2014. At the hearing, District waived the statutory time limit for publication of a written decision.

ISSUE

Whether District has the right to assess Student pursuant to the March 18, 2014 assessment plan to determine whether he is eligible for special education and related services.

SUMMARY OF DECISION

District seeks authorization from OAH to assess Student to evaluate if he qualifies for special education and related services because Student's mother expressly refused consent to District's proposed assessment plan. Student works below grade level standards and engages in behaviors that interfere with his learning and the learning of other students. District contends it has reason to suspect Student has a disability and that because of a disability, he requires special education and related services. District's suspicion that Student has a disability is reinforced by the fact that Student only weakly benefitted from general education interventions District used to address Student's academic, attention, and behavioral difficulties.

District met its burden of demonstrating that it has a reasonable basis for its belief that Student's academic and behavioral problems in the classroom could be related to a disability and that it complied with the procedural requirements for presenting Mother with an assessment plan. Therefore, District is authorized to conduct the assessments of Student proposed in the March 18, 2014 assessment plan.

FACTUAL FINDINGS

1. Student was six years and 10 months old at the time of hearing. At all relevant times, he lived with his Mother within District boundaries. English is spoken at home. Student attended Eckstrand Elementary School for kindergarten in the 2012-2013 school year and first grade in the 2013-2014 school year. He had never been assessed for special education eligibility.

2. During the first trimester of his first grade year in the 2013-2014 school year, Student's general education teacher, Kelly Bermudez, observed that Student lacked basic reading skills to become an independent reader, and he had trouble with basic addition skills. Student also had difficulty paying attention in class. He had trouble focusing both during lessons and while completing his assignments. Because he was unable to complete assignments, Student did not get a review of previous skills and was not practicing new material learned. Although most first grade students in Ms. Bermudez's class could maintain

focus for 10 to 15 minutes and some even 20 minutes, Student could not stay focused for even five minutes. Several times a day Student interrupted Ms. Bermudez's lessons by verbally shouting out and by getting up off the rug or getting out of his seat and walking around the classroom or coming up to Ms. Bermudez and hugging her. Student's attention challenges also negatively impacted his classmates. When Student got distracted, he talked to other students, demanded help from other students, or asked them to do his work for him. Ms. Bermudez stopped lessons to address Student's off-task behavior.

3. In November 2013, Ms. Bermudez requested a Student Study Team meeting to discuss Student's academic and behavioral difficulties and to develop strategies to support Student in improving his academic skills and maintaining focus in class. Four Student Study Team meetings were held during the school year, in December 2013, February 2014, March 2014, and, after this case was filed, in May 2014. Mother only attended the February 2014 meeting. Other participants in the Student Study team meetings were Ms. Bermudez, the school's principal Lucinda Newton, another general education teacher, a school psychologist, and an intervention teacher.

4. Based on the discussions held at the Student Study Team meetings, Ms. Bermudez and other staff at Eckstrand provided Student general education interventions to address his academic and behavioral difficulties. Student participated in the Voyager Passport program to develop his reading and comprehension skills. He received small group instruction from a classroom aide. He had a behavior plan to improve his behavior with respect to raising his hand and waiting to be called on, remaining in his seat, completing assignments, and staying on task for one minute, then three minutes.

5. District's general education interventions helped Student make some progress, but Student's academic, attention, and behavior problems continued to interfere with his education. Student remained significantly below grade level in reading and writing. Student had academic concerns in math calculation throughout the school year, and began to demonstrate difficulty with math reasoning skills. Throughout the school year Student continued to have a short attention span and was impulsive; he also began to appear to be overactive and at times aggressive.

6. Student's continuing academic and behavioral difficulties caused Ms. Bermudez and Principal Newton to suspect that Student had a disability that was inhibiting his ability to access his education and that he might qualify for special education and related services. Ms. Bermudez thought Student was bright and had the ability to be successful in school, but that his attention concerns were hindering his academic performance. Ms. Bermudez and Principal Newton recommended that Student be assessed to obtain more

data that might assist school personnel in understanding why Student did not make the progress they expected from the general education interventions they provided and to learn if there was something else they could do to better serve Student.

7. School Psychologist Rubie Carriedo developed a plan to conduct a complete psycho-educational assessment of Student. Based on her incidental observation of Student while conducting a classroom observation of another student she was assessing, Ms. Carriedo was aware of Student's attentional difficulties. She had seen Student off task, with his back turned from the teacher, tying his shoes under his desk, interrupting the teacher, not being engaged, talking to himself, and trying to get other peers off task, even after redirection from the teacher. Student had a hard time filtering out distractions in the room. Ms. Carriedo believed Student's behaviors were significantly interfering with his learning in the classroom. Based on her casual observation of Student and the information from the three Student Study Team meetings that had been held before she developed the assessment plan, she suspected that Student might have special education eligibility in the categories of Other Health Impairment, Specific Learning Disability, or possibly Emotional Disturbance. Ms. Carriedo designed the assessment plan to assess Student in all suspected areas of disability. Specifically, the assessment plan called for formal testing, observations, and interviews to assess: academic/pre-academic achievement; social/adaptive/behavioral/emotional functioning; processing; intellectual/cognitive development; and health/developmental levels.

8. On March 18, 2014, District sent Mother, via certified mail and email, prior written notice that District proposed to assess Student for eligibility for special education and related services. District provided Mother the notice letter, assessment plan, Student Study Team meeting notes, and Parent Rights and Procedural Safeguard documents in English. The assessment plan was in plain language and indicated the types of assessments proposed to be conducted and the type of professional who would conduct each category of assessment. The notice letter and the assessment plan both indicated that if Mother consented to the assessments, special education placement or services would not be provided without her written consent.

9. On March 27, 2014, District received the assessment plan back from Mother. Mother signed the form, acknowledging receipt of the plan and the parents' rights and procedural safeguards, and refusing consent to the assessments.

10. On April 4, 2014, District filed this request for a due process hearing seeking authorization from OAH to assess Student for eligibility for special education and related services despite Mother's written refusal of consent.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)² et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

² All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

“the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals (Ninth Circuit) has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, District, as the complaining party, bears the burden of proof.

District is Authorized to Conduct the Proposed Assessments

5. District contends it has reason to suspect Student has a disability and that because of a disability, he requires special education and related services. Student has demonstrated academic and behavioral difficulties and, despite District providing interventions and supports, Student continues to work below grade level standards and to engage in behaviors that interfere with his learning and the learning of other students. District

proposed to assess Student for eligibility for special education and related services, and Mother expressly refused consent. District seeks authorization from OAH to assess Student for special education and related services.

6. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as “child find.” California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a), (b).)

7. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)). The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

8. A district’s child find duty is not dependent on any request by the parent for special education testing or referral for services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301.) Child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade, and regardless of the severity of the disability. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194; 34 C.F.R. § 300.111(a)(1) & (c)(1).) “[A] child should not have to fail a course or be retained in a grade in order to be considered for special education and related services.” (71 Fed. Reg. 46580 (Aug. 14, 2006).)

9. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child’s eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

10. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student’s educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.)³ An assessment may be

³ The IDEA uses the term “evaluation,” while the California Education Code uses the term “assessment.” This decision will use the term “assessment.”

initiated by request of any one of a number of people or agencies, including a teacher or other service provider of the student. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, § 56029, subd. (b).)

11. When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan, along with notice of the parent's rights. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in language easily understood by the general public, be provided in the native language of the parent, explain the types of assessments to be conducted, and state that no individualized education program will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c)(4).)

12. Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, in the event that a parent or student does not provide consent, the district may bring a due process complaint seeking an order allowing it to conduct the proposed assessment. (20 U.S.C. § 1414(a)(1)(D)(ii)(I); Ed. Code, § 56321, subd. (c)(2); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated"].)

13. Here, Student's teacher noticed Student was struggling with his academic skills, attention, and behavior and, after there was only very limited improvement from a variety of general education interventions, she referred him for assessment for suspected disabilities. District responded to Student's teacher's request for assessments for special education eligibility by providing prior written notice and an initial assessment plan to Mother. The assessment plan was in language easily understood by the general public, was provided in Mother's native language, explained the types of assessments to be conducted, and indicated that no educational placement or services would result from the assessment without the consent of the parent. District also provided Mother with a copy of the notice of parents' rights. Mother refused consent to the initial assessment of Student by returning the assessment plan with her written refusal on March 27, 2014.

14. District met its burden of proof that District has a reasonable basis to believe that Student's academic and behavioral challenges could be related to a disability and that the assessment plan it developed was properly presented to Mother, who refused consent. Accordingly, District may conduct the assessments without Mother's consent.

ORDER

District may assess Student pursuant to the March 18, 2014 assessment plan at any time during the school day.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on the sole issue.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 12, 2014

_____/s/_____
KARA K. HATFIELD
Administrative Law Judge
Office of Administrative Hearings